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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

M.O., JR., a Minor, etc., et al., Plaintiffs and Appellants, v. PALOMAR HEALTH, Defendant and Respondent.	D074410 (Super. Ct. No. 37-2017-00012616-CU-MM-NC)

APPEAL from a judgment of the Superior Court of San Diego County, Ronald F. Frazier, Judge. Affirmed.

Donahue & Horrow, Thomas E. Donahue, Scott E. Calvert; Law Offices of Douglas A. Greer and Douglas A. Greer for Plaintiffs and Appellants.

Lewis Brisbois Bisgaard & Smith, Jeffry A. Miller, Craig T. Mann and Tracy D. Forbath for Defendant and Respondent.

I

INTRODUCTION

Minor and his parents sued two on-call physicians, Palomar Hospital (Hospital), and others for injuries Minor allegedly sustained during birth. At issue in this appeal is whether the trial court appropriately granted summary judgment for the Hospital on the ground the Hospital could not be vicariously liable for any negligence by the on-call physicians because the physicians were independent contractors and not the Hospital's employees or ostensible agents.

We conclude the Hospital provided evidence showing Mother had reason to know the on-call physicians were not the Hospital's employees or agents, and Minor and his parents did not provide countervailing evidence sufficient to raise a triable issue of material fact on this point. We further conclude Minor and his parents cannot establish the physicians were the Hospital's employees, rather than independent contractors, under the test recently announced in *Dynamex Operations v. Superior Court* (2018) 4 Cal.5th 903 (*Dynamex*) because this test only applies to wage order claims. (*Id.* at p. 914.) Finally, we conclude Minor and his parents have forfeited any contention the physicians were the Hospital's employees under any other potentially applicable test for distinguishing between employees and independent contractors (see, e.g., *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 350–355 (*S. G. Borello*)) because they did not raise the issue in their opposition papers below. Accordingly, we affirm the judgment.

II

BACKGROUND

In the latter half of her pregnancy with Minor, Mother began receiving prenatal care from a women's specialty medical group. As part of the process of becoming the medical group's patient, Mother executed four documents: (1) an "Authorization for Assignment of Benefits, Payments of Accounts, and Release of Information"; (2) a "Medical Records Release"; (3) a "Prenatal Screening and Testing Consent"; and (4) an "Obstetrical Worksheet." Each of these forms bore the medical group's logo and address. The Medical Records Release also listed the medical group's affiliated physicians and health care providers. The list included the two on-call physicians who attended Mother during her labor and delivery (discussed further *post*).

During her pregnancy, Mother visited the Hospital on multiple occasions for prenatal stress testing. On at least nine occasions, she signed a "Conditions of Admission" form. The second paragraph on the first page of the form was headed with boldface, capital letters stating, "**PHYSICIANS ARE INDEPENDENT MEDICAL PRACTITIONERS**." The paragraph itself, which Mother initialed, stated, "All physicians and surgeons providing services to me, including the radiologist, pathologist, emergency physician, anesthesiologist and others, are <u>not</u> employees or agents of the hospital. They have been granted the privilege of using the hospital for the care and treatment of their patients, but they are <u>not</u> employees or agents of the hospital." At the end of the form, above Mother's signature, was a statement certifying Mother had read and received a copy of the form.

After Mother went into labor, she went to the Hospital's labor and delivery ward, where she was registered and placed in a room. She signed and initialed another "Conditions of Admission" form with advisements identical to those described *ante*.

Because of a shift change, two on-call physicians handled Mother's care during the labor and delivery process. One on-call physician admitted Mother to the Hospital and then transferred Mother's care to another on-call physician, who delivered Minor. The on-call physician who admitted Mother was an employee of the women's specialty medical group. The on-call physician who delivered Minor was one of the medical group's members or partners.

Mother testified at her deposition she never met the on-call physician who admitted her to the Hospital; she only met the on-call physician who delivered Minor. She also testified the on-call physician who delivered Minor was not the physician the women's specialty medical group had assigned to her when she became the medical group's patient, she did not know the on-call physician was affiliated with the medical group, and she did not understand what the on-call physician's relationship was with the Hospital. However, after Minor's birth, the on-call physician who delivered Minor saw her at his office with the medical group.

III

DISCUSSION

A

A hospital is liable to a patient for a physician's malpractice if the hospital employs the physician or the physician is the hospital's ostensible agent. (*Jacoves v.*

United Merchandising Corp. (1992) 9 Cal.App.4th 88, 103–104.) A physician is the ostensible agent of a hospital if the hospital intentionally or negligently causes the patient to believe the physician is the hospital's agent. (Civ. Code, § 2300.) Accordingly, to hold a hospital liable for a physician's negligence under an ostensible agency theory, (1) the hospital must have engaged in conduct that would cause a reasonable person to believe the physician was the hospital's agent, and (2) the patient must have relied on the apparent agency relationship. (*Markow v. Rosner* (2016) 3 Cal.App.5th 1027, 1038 (*Markow*); *Mejia v. Community Hospital of San Bernardino* (2002) 99 Cal.App.4th 1448, 1453 (*Mejia*).)

" '[T]he issue of agency is a quintessential question of fact [citations]." (*Whitlow v. Rideout Memorial Hospital* (2015) 237 Cal.App.4th 631, 635.) However, "it 'becomes a question of law when the facts can be viewed in only one way.' [Citation.]" (*Markow*, *supra*, 3 Cal.App.5th at p. 1039.) "In the physician-hospital-patient context, ostensible agency is a factual issue '[*u*]*nless the evidence conclusively indicates that the patient should have known that the treating physician was not the hospital's agent, such as when the patient* is treated by his or her personal physician' or *received actual notice of the absence of any agency relationship*. [Citation.]" (*Ibid.*, italics added.)

The first element of ostensible agency is met if the hospital holds itself out to the public as the provider of care, unless the hospital gave the patient contrary notice under circumstances in which the patient could be expected to understand and act upon the information. The second element is met if the patient looks to the hospital for services

rather than to an individual physician. (*Markow, supra,* 3 Cal.App.5th at p. 1038; *Mejia, supra,* 99 Cal.App.4th at pp. 1453–1455.)

"*Ultimately, 'there is really only one relevant factual issue: whether the patient had reason to know that the physician was not an agent of the hospital*. ... [H]ospitals are generally deemed to have held themselves out as the provider of services unless they gave the patient contrary notice, and the patient is generally presumed to have looked to the hospital for care unless he or she was treated by his or her personal physician. Thus, *unless the patient had some reason to know of the true relationship between the hospital and the physician—i.e., because the hospital gave the patient actual notice* or because the patient was treated by his or her personal physician—ostensible agency is readily inferred.' [Citation.]" (*Markow, supra,* 3 Cal.App.5th at p. 1038, quoting *Mejia, supra,* 99 Cal.App.4th at pp. 1454–1455, italics added.)

In this case, the Hospital presented evidence Mother had reason to know the on-call physicians who treated her at the Hospital were not the Hospital's employees because it gave her actual notice of this fact. Specifically, the Hospital provided Mother with and she signed and initialed multiple "Conditions of Admission" forms unequivocally advising her all physicians providing services to her at the Hospital were independent medical providers and none were employees or agents of the Hospital. As to the two on-call physicians who attended her during her labor and delivery, this evidence was bolstered by the women's specialty medical group's "Medical Release Form," which Mother signed, showing the on-call physicians were affiliated with the group.

Mother did not provide any evidence suggesting she received and signed the "Conditions of Admission" forms under circumstances in which she could not be expected to understand or act upon the information in them. To the contrary, most of the forms were provided to her when she was at the Hospital for routine prenatal stress testing. Mother's deposition testimony indicating she did not know the relationship between the Hospital and the on-call physician who delivered Minor or of the physician's affiliation with the women's specialty medical group does not raise a triable issue of material fact on this point. Without weighing or questioning the credibility of this evidence, it does not counter the Hospital's evidence showing Mother had reason to know the on-call physicians were not the Hospital's employees or agents because the Hospital repeatedly provided Mother with actual notice of this fact. Consequently, we conclude Minor and his parents have not established the court erred in granting summary judgment for the Hospital.

B

Although not raised as an issue in their opposition papers below, Minor and his parents alternatively contend we must reverse the judgment because shortly before the court ruled on the Hospital's motion for summary judgment, the California Supreme Court issued its opinion in *Dynamex*, *supra*, 4 Cal.5th 903, which altered the test for determining whether an individual is an employee or an independent contractor. (*Id.* at p. 964.) More particularly, they contend the Hospital cannot establish the on-call physicians were independent contractors under the *Dynamex* test.

The Hospital contends we must reject this contention for two reasons. First, the Hospital contends the holding in *Dynamex* only applies to wage order claims. We agree with both points. Second, the Hospital contends Minor and his parents forfeited consideration of this issue on appeal because they did not challenge the on-call physicians' status as independent contractors in the opposition papers below.

The Supreme Court expressly limited the holding in *Dynamex* to the specific context of "whether workers should be classified as employees or as independent contractors *for purposes of California wage orders*." (*Dynamex, supra*, 4 Cal.5th at p. 914.) There are no wage order claims at issue in this case.

In addition, Minor and his parents' opposing papers below did not challenge the on-call physicians' status as independent contractors under any other potentially applicable standard. (See, e.g., *S. G. Borello, supra*, 48 Cal.3d at pp. 350–355.) " 'As a general rule, theories not raised in the trial court cannot be asserted for the first time on appeal; appealing parties must adhere to the theory (or theories) on which their cases were tried. This rule is based on fairness—it would be unfair, both to the trial court and the opposing litigants, to permit a change of theory on appeal ... .' [Citation.]" (*Nellie Gail Ranch Owners Assn. v. McMullin* (2016) 4 Cal.App.5th 982, 997.)

There is an exception to this general rule for new theories involving only legal questions that can be determined from facts uncontradicted in the record and unalterable by the presentation of additional evidence. (*Ward v. Taggart* (1959) 51 Cal.2d 736, 742; *In re Marriage of Priem* (2013) 214 Cal.App.4th 505, 511.) However, the exception does not apply here because the question of the on-call physicians' status as independent

contractors requires consideration of facts not included in the record (see, e.g., *S. G. Borello*, *supra*, 48 Cal.3d at pp. 350–355) and is, therefore, a question that may be altered by the presentation of additional evidence.

IV

DISPOSITION

The judgment is affirmed. Respondent is awarded its appeal costs.

McCONNELL, P. J.

WE CONCUR:

BENKE, J.

IRION, J.